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Mohd Asri bin Ahmad v Deputy Public Prosecutor

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO MT1–41–09 OF 2004
LOW HOP BING J
2 AUGUST 2005

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Criminal Procedure — Plea of guilt — Safeguards for ensuring validity — Whether complied — Whether plea conditional

Criminal Procedure — Sentence — Drug addict — Escape from rehabilitation centre — Previous convictions — Whether 14 months imprisonment and one stroke of the rotan excessive — Drug Dependants (Treatment and Rehabilitation) Act 1983 s 19(1)(b)

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The accused was charged for unlawfully escaping from a drug rehabilitation centre under s 19(1)(b) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). He informed the court on two separate occassions that he understood the charge, to which he wished to plead guilty and that he understood the nature and consequences of his plea. The magistrate convicted and sentenced him to 14 months imprisonment and one stroke of the rotan under s 19(3) of the Act. Defence counsel submitted on appeal that: (1) the accused's guilty plea was conditional and equivocal in view of the accused's request for postponement if a fine was not allowed; and (2) the sentence was manifestly excessive as the imprisonment term was not mandatory and the court below had not considered the mitigation plea in the exercise of the discretion.

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Held, dismissing the appeal:

(1) Under s 305 of the Criminal Procedure Code ('CPC'), a person who had been convicted on his plea of guilty was entitled to appeal only against the extent or legality of the sentence, but once the appeal had been lodged, he was not prevented from contending that the conviction was illegal and requesting the judge to act in revision, as the judge was entitled to do so: (see para 10); *Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645 followed.

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(2) The safeguards to the accused who wishes to plead guilty to a charge in court had been meticulously complied with. The learned magistrate had taken every procedural step to ensure that that plea was valid and unequivocal. Therefore, the accused's plea of guilty was unconditional (see para 15).

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(3) The sentence allowable under s 19(3) of the Act was a term of imprisonment not exceeding five years or whipping not exceeding three strokes or both (see para 23). The court below had had due regard to the nature of the offence, public interest, and most importantly, the previous convictions of the accused (see para 25). Given the facts of the

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case and the antecedents of the accused, the learned magistrate had acted on correct principles. The sentence imposed on the accused was not manifestly excessive (see para 26).

[**Bahasa Malaysia summary**

Tertuduh dituduh melarikan diri daripada pusat pemulihan dadah di bawah s19(1)(b) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 ('Akta tersebut'). Tertuduh memberitahu mahkamah pada dua masa berlainan bahawa tertuduh memahami tuduhan itu dan ingin mengaku bersalah dan memahami keseluruhan sifat dan akibat plinya. Majistret telah mensabitkan dan menghukum tertuduh kepada 14 bulan penjara dan 1 sebatan rotan di bawah s 19(3) Akta tersebut. Peguam cara pembelaan menyatakan dalam rayuan bahawa: (1) pli mengaku bersalah tertuduh adalah bersyarat dan terpaksa mengambil kira permohonan tertuduh untuk satu tundaan sekiranya denda tidak diberi; dan (2) hukuman terlalu berat kerana tempoh penjara tidak mandatori dan mahkamah di bawah tidak mengambil kira pli mitigasi apabila menggunakan budi bicaranya.

Diputuskan, menolak rayuan itu:

(1) Di bawah s 305 Kanun Acara Jenayah ('KAJ'), seseorang yang disabit atas pli mengaku salah berhak untuk merayu hanya terhadap keberatan atau kesahan hukuman, tetapi apabila rayuan telah dibuat, tertuduh tidak dihalang daripada mengatakan bahawa sabitan adalah tidak sah dan memohon kepada hakim untuk menyemak sabitan itu dan hakim berhak untuk membuat demikian (lihat perenggan 10); *Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645 diikut.

(2) Segala langkah perlindungan kepada tertuduh yang ingin memplid bersalah kepada tuduhan di mahkamah telah diikut. Majistret telah mengambil segala langkah-langkah prosedural untuk memastikan bahawa pli tertuduh sah dan jelas. Oleh itu, pli bersalah tertuduh adalah tidak bersyarat (lihat perenggan 15).

(3) Hukuman yang dibenarkan di bawah s 19(3) Akta itu adalah untuk tempoh penjara tidak melebihi lima tahun atau rotan tidak melebihi tiga kali atau kedua-duanya (lihat perenggan 23). Mahkamah di bawah telah mengambil kira sifat kesalahan itu, kepentingan awam dan terpenting sekali, sabitan-sabitan tertuduh yang lain (lihat perenggan 25). Dengan fakta-fakta kes dan sifat-sifat tertuduh, majistret telah bertindak di atas prinsip-prinsip yang betul. Hukuman yang dijatuhkan ke atas tertuduh tidak terlalu berat (lihat perenggan 26).]

Notes

For a case on safeguards ensuring validity, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2428.
For cases on drug addict, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3388–3391.

Cases referred to

Koh Mui Keow v Regina [1952] 1 MLJ 214 (refd)
Lee Weng Tuck & Anor v PP [1989] 2 MLJ 143 (refd)
Lee Yu Fah & Ors v PP [1937] 6 MLJ 179 (refd)
Melvani v PP [1971] 1 MLJ 137 (refd)
Mohammad bin Hassan v PP [1998] 5 MLJ 65 (refd)
Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 1 MLJ 645 (folld)
New Tuck Shen v PP [1982] 1 MLJ 27 (refd)
PP v Shari Mohd Sharif [2005] 4 MLJ 763 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134 (refd)

Legislation referred to

Criminal Procedure Code ss 173(b), 305
Dependants (Treatment and Rehabilitation) Act 1983 ss 3(1), 4(1)(b), 19(1)(b), (3)
Penal Code s 324

Appeal from: Arrest Case No 83–216 of 2004 (Magistrate's Court, Alor Gajah)

Markhan Singh (Mohd Latip & Associates) for the appellant.
Abdul Rashid bin Hj Daud (Deputy Public Prosecutor, Pejabat Penolong Undang-Undang Negeri Melaka) for the respondent.

Low Hop Bing J:

I Appeal

[1] This is an appeal by the appellant-accused ('the accused') against the decision of the learned magistrate who had on 24 August 2004 convicted the accused of an offence under s 19(1)(b) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act') and sentenced him to 14 months imprisonment and one stroke of the rotan under s 19(3) of the Act.

II The Charge

[2] The charge preferred against the accused reads as follows:

Bahawa kamu di antara jam 8pm hingga 9.40pm 25 April 1999 di Pusat Serenti Tampin, Pulau Sebang, di dalam daerah Alor Gajah, di dalam negeri Melaka,

sebagai seorang penagih dadah yang ditahan dengan sahnya disisi undang-undang dibawah s 6(1)(a) Akta Penagih Dadah (R&P) 1983 didapati kamu telah melarikan diri dari Pusat tersebut. Oleh yang demikian kamu telah melakukan kesalahan dibawah s 19(1)(b) APD (R&P) 1983 dan boleh dihukum di bawah s 19(3) Akta yang sama.

My Translation:

That you between 8pm and 9.40pm on 25 April 1999 at Serenti Centre Tampin, Pulau Sebang, in the district of Alor Gajah, in the state of Melaka, as a drug dependant lawfully detained under s 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 was found to have escaped from the Centre and you have thereby committed an offence under s 19(1)(b) of the Act and punishable under s 19(3) of the same Act.

III Pleading Guilty

[3] The accused had pleaded guilty to the charge.

[4] The notes of proceedings and grounds of decision show that on 17 July 2004, the accused appeared in person for the first time. When the charge was read and explained to him, he informed the court that he understood the charge, to which he wished to plead guilty and that he understood the nature and consequences of his plea.

[5] At the request of the prosecution, the court adjourned the case to 24August 2004 for facts and sentence. On 24 August 2004, the same procedural steps were repeated. Thereafter the facts tendered by the prosecution were read and explained to the accused who understood those facts which he also admitted as correct.

[6] It was only after the completion of all these procedural steps that the court had accepted the accused's guilty plea and convicted the accused. The notes of proceedings show that the accused's guilty plea was voluntary and without any compulsion.

[7] Thereafter, the accused pleaded in mitigation in the following words:

Saya telah berkahwin, ada tiga anak dan masih bersekolah. Isteri tidak bekerja. Pohon dikenakan denda. Isteri sedang mengandung dua bulan. Tiada lagi. Pohon tangguh hukuman jika tidak dibenarkan denda. Tiada lagi.

My translation:

I am married with three school-going children. My wife is not working. Pray that a fine be imposed. My wife is currently two months pregnant. That's all. Pray for postponement if the fine is not allowed. That's all.

[8] Learned defence counsel Mr Markhan Singh submitted that the accused's guilty plea is conditional and equivocal in view of the accused's request for postponement if the fine was not allowed. He added that the appeal record

did not show that the court had informed the accused that the fine was not allowed and imprisonment would be imposed, so that the accused could reconsider on his guilty plea, and that as a result, the conviction was wrong in law, relying on *Lee Yu Fah & Ors v Public Prosecutor* [1937] 6 MLJ 179 (HC); *Lee Weng Tuck* & *Anor v Public Prosecutor* [1989] 2 MLJ 143 (SC); *Mohammad bin Hassan v Public Prosecutor* [1998] 5 MLJ 65 (HC); and *Koh Mui Keow v Regina* [1952] 1 MLJ 214.

[9] Learned deputy public prosecutor Mr Abdul Rashid bin Hj Daud contended that the learned magistrate had complied with s 173(b) of the Criminal Procedure Code ('CPC') and the judgment in *Lee Weng Tuck* and that the accused's guilty plea is not a conditional one.

[10] In my judgment, it is trite law that under s 305 of the CPC, a person who has been convicted on his plea of guilty is entitled to appeal only against the extent or legality of the sentence, but once the appeal has been lodged, he is not prevented from contending that the conviction was illegal and requesting the judge to act in revision, as the judge is entitled to do so: per Gopal Sri Ram JCA delivering the majority judgment of the Court of Appeal in *Mohd Dalhar Bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645 at p 654E–H; *Lee Yu Fah* and *Mohammad bin Hassan*.

[11] This brings me to the question as to whether the accused's plea of guilty is a conditional one.

[12] The answer to this question may be ascertained by reference to s173(b) of the CPC which reads:

> If the accused pleads guilty to the charge, whether as originally framed or as amended the plea shall be recorded and he may be convicted thereon:
>
> Provided that before a plea of guilty is recorded the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

[13] In my judgment, s 173(b) contains built-in safeguards to the accused who wishes to plead guilty to a charge in court.

[14] These safeguards have been succinctly set out by the then Supreme Court in *Lee Weng Tuck* where one of the main issues was whether the appellant's plea was unequivocal. In delivering judgment of the court, Mohamed Azmi SCJ (as he then was) at p 1471 left to A right held *inter alia,* as follows:

> A plea of guilty must be valid and unequivocal, and in order to determine the validity of a plea of guilty, the safeguards which must be followed might be stated as follows:
>
> (i) The court must ascertain that it is the accused himself who wishes to plead guilty.

(ii) The court must ascertain that the accused understands the nature and consequences of his plea.

(iii) The court must ascertain that the accused intends to admit without qualification the offence alleged against him;

[15] Applying s 173(b) and the above judgment of the Supreme Court to the notes of proceedings recorded by the learned magistrate, there can be no doubt in my mind that the safeguards have been meticulously complied with and so I am unable to hold that the accused's plea of guilty is conditional. Inmy view, the learned magistrate has taken every procedural step to ensure that that plea was valid and unequivocal.

[16] Whether a guilty plea was valid and unequivocal was a question of mixed law and fact but the validity of the plea must first be established before the plea could be said to be unequivocal: *Lee Weng Tuck* p 148A–B.

[17] The appellants in *Lee Weng Tuck* had originally claimed trial to a capital case but subsequently indicated that they wished to change their plea. A third accused had claimed trial. The trial judge accepted the pleas of guilty and convicted them, but had adjourned the case for sentence. At the resumed hearing, the appellants applied to withdraw their plea of guilty and gave their reasons, but the trial judge refused to allow the appellants to change the plea and sentenced them to death. The Supreme Court held that there were reasons which gave rise to a reasonable doubt as to the validity and unequivocality of the guilty plea due to a failure to take proper safeguards, then the court has no discretion but to permit the accused to retract his plea.

[18] Another illustration may be found in the case where the charge was neither read nor explained to the accused and the court is not satisfied that the accused has understood and admitted each and every allegation in the charge to which she has pleaded guilty, as in *Koh Mui Keow* in which case Brown J ordered a retrial.

[19] In my view, the facts in the above two authorities are substantially different from those in the instant appeal and so they are of no assistance to the accused herein.

[20] In the circumstances, I am unable to accept the defence contention that the accused's plea of guilty is a conditional one. Instead, I hold that it is a valid and unequivocal plea.

IV Sentence

[21] The defence took the view that the sentence is manifestly excessive as the imprisonment term is not mandatory and the court below has not considered the mitigation plea in the exercise of the discretion.

[22] The learned deputy did not subscribe to that view and urged the court not to interfere with the sentence.

[23] My perusal of s 19(3) of the Act reveals that the sentence allowable thereunder is a term of imprisonment not exceeding five years or whipping not exceeding three strokes or both.

[24] The learned magistrate has imposed the sentence after taking into account the plea of guilty and all the above mitigating factors, and has referred to *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134; and *Melvani v Public Prosecutor* [1971] 1 MLJ 137.

[25] In my view, the court below has had due regard to the nature of the offence, public interest, and most importantly, the previous convictions of the accused viz. two under ss 4(1)(b) and 3(1) both of the same Act, for which he had been sent to the Serenti Centre for two years respectively. The third offence was for causing hurt with a dangerous weapon under s 324 of the Penal Code and the sentence meted out was six months' imprisonment.

[26] Given the facts of the case and the antecedents of the accused, I hold that the learned magistrate has acted on correct principles. The sentence imposed on the accused is not manifestly excessive. There is no error to justify appellate interference: See *New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27 at p 31D–E right (HC), and *Public Prosecutor v Shari Mohd Sharif* [2005] 4 MLJ 763 at p 449A–C (HC).

V Conclusion

[27] On the foregoing grounds, I dismiss this appeal and affirm the decision of the court below.

Appeal dismissed.

Reported by Loo Lai Mee